

United States Bankruptcy Court
Eastern District of Michigan
Southern Division - Flint

In re:

Bette Ann St. Martin,

Debtor.

Case No.05-32910-WS

Chapter 7

Opinion Granting Trustee's Objection to the Debtor's Claimed Exemption in Retirement Account with Merrill Lynch

This matter is before the Court on the Trustee's objection to a claimed Retirement Account the Debtor, Bette Ann St. Martin, is attempting to exempt under 11 U.S.C. 522(d)(10)(E). A hearing was held to determine if the Retirement Account in question qualifies for an exemption under 522(d)(10)(E). The Court has concluded that the Retirement Account does not qualify and thus may not be exempted.

I. Facts

Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code, as amended, on June 8, 2005. On Schedule B of her Petition, Debtor claims an interest in a Retirement Account ("Retirement Account") with Merrill Lynch having a value of \$46,442.74. Debtor actually has two separate accounts with Merrill Lynch. The first account, the Retirement Account at issue, is an annuity with a current value of approximately \$45,637.00. The second is an Individual Retirement Account (I.R.A.) having an approximate value of \$14,053.00 (which is not involved in what is before the Court). On Schedule C, the Debtor asserts that the Retirement Account is exempt under 11 U.S.C. § 522(d)(10)(E) in the aggregate amount of \$46,442.74, which was its value at the time the Petition was filed. The Trustee

is objecting to that claimed exemption in its entirety pursuant to 11 U.S.C. §522(d)(10)(E) because the plan does not qualify for the exemption.

The parties stipulated to the following facts:

1. That the annuity was purchased with proceeds from the sale of a house after the Debtor's divorce that occurred in 1997, and that it totaled \$45,000 in a premium that was paid to Merrill Lynch.

2. The annuity is a non-qualified contract as defined in Paragraph 9 of the definitions in the Merrill Lynch Annuity Contract, which reads:

"A retirement arrangement plan other than a qualified plan described under Section 401, 403, 408, 457 or any similar provisions of the Internal Revenue Code."

Debtor testified that she worked until September 25, 2005, but no longer has a job. She cannot recall why she purchased the Retirement Account, but she thought it must have been for retirement purposes. Debtor stated that she could use the money from the Retirement Account when she needs it and that she needs it now. She has only used money from the account recently and the money went toward payment of her credit card and medical bills. The maximum age to own this Retirement Account is 85 and there is a \$40 charge for her to make a withdrawal or change the account setup. Debtor also has a 401K plan through her former employer that has an account balance of approximately \$39,000, which is also not involved in what is before the Court.

II. Discussion

The Trustee, as the objecting party, bears the burden of proving that the *prima facie* assumption that the exemption is proper is incorrect. *In re Mann*, 201 B.R. 910, 915 (Bkrctcy. E.D Mich 1996). If the trustee does not carry the burden of proving by a preponderance of the evidence that the exemption should be disallowed, then the exemption will be deemed correct. *Id.*

The Trustee argues that the Retirement Account is an annuity which does not qualify for an exemption because the word “annuity” is a generic term and this particular annuity does not meet the proper definition to be exempt. Section 522(d)(10)(E) states that the following may be exempt:

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless --

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986. (Emphasis added.)

As noted, the parties stipulated to the fact that this annuity is a non-qualified contract, and indeed it is so, as defined in Paragraph 9 of the definitions in this particular Merrill Lynch Annuity Contract itself, which reads (and describes this annuity as):

A retirement arrangement plan other than a qualified plan described under Section 401, 403, 408, 457 or any similar provisions of the Internal Revenue Code. (Joint Exhibit A.)

Faced with the stipulation and provision, the necessary conclusion is that to the fact that it is not exempt under the plain language of the statute. As such, the Court need not opine any further and must grant the Trustee’s objection to the exemption of the Retirement Account at issue.

An appropriate order will issue.

Entered: July 06, 2006

/s/ Walter Shapero
Walter Shapero
United States Bankruptcy Judge